

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELAD P.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No.2011090413

DECISION

This matter was heard on October 31, 2011, at the Westside Regional Center in Culver City, California, by Chris Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California. Claimant Elad. P. (Claimant) was represented by his parents, Dafnit and Eddie P. (mother and father, respectively, or parents collectively). Westside Regional Center (Service Agency or Regional Center) was represented by Lisa Basiri, Fair Hearing Coordinator.

Oral and documentary evidence was presented, argument was heard, and the matter was submitted on October 31, 2011.

ISSUE

The parties agreed that the following issue is to be resolved: Is Claimant eligible for services from the Service Agency?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant was born September 11, 1989, and is now 22 years old. He has applied, and claims to be eligible, to receive services from Service Agency based on a diagnosis of Autism and/or for a condition requiring treatment similar to that required for a mentally retarded person, otherwise known as the "fifth category" (fifth category).

Sometime prior to April 11, 2011, Claimant contacted the Service Agency and requested that he be deemed eligible to receive Service Agency services.

2. In letters dated April 21 and August 31, 2011, the Service Agency denied eligibility, asserting that Claimant did not have a developmental disability and was not eligible for services. Service Agency also sent a Notice of Proposed Action dated September 2, 2011, which stated that Claimant was not eligible for services because he did not have a qualifying disability with a substantial handicap.
3. On September 11, 2011, Claimant filed a Request for Fair Hearing. This hearing ensued.

Service Agency's Evidence

4. Claimant is a non-conserved adult and resides with his parents and his 16 year-old non-disabled brother. He graduated from Oak Park High School, where he was in a general education setting. However, he also received formal speech therapy (ST) at school, as well as informal assistance from a vice-principal at the school regarding Claimant's behavior and communication deficits. It was not established that the school district diagnosed Claimant as having Autism or otherwise.
5. It was undisputed that Claimant has serious deficits. Various doctors have diagnosed him with Asperger's Disorder/Syndrome (Asperger's), Autistic Disorder (Autism), Obsessive Compulsive Disorder (OCD), Attention Deficit Hyperactivity Disorder (ADHD), and Attention Deficit Disorder (ADD). Pervasive Developmental Disorder/Not Otherwise Specified (PDD/NOS) was also considered by the Service Agency, but no formal diagnosis of PDD/NOS was made.
6. On May 13, 2011, the Service Agency issued a "Westside Regional Center Psychological Assessment." However, this "assessment" was actually a letter which summarized Claimant's history and current functioning. Rafael Garcia, M.A., Intake Counselor recommended a psychological assessment to assess Claimant's adaptive functioning. That assessment is discussed immediately below.
7. The Service Agency had Claimant evaluated by Melissa Bailey Arizpe, Psy.D. (Arizpe), a license psychologist. Arizpe evaluated Claimant on June 29 and July 28, 2011, and issued a written report thereafter. Her diagnostic impressions were Asperger's, OCD, and ADHD. Parents contended that Arizpe's opinion should be given little weight because it "incorrectly" stated when Claimant began speaking and because Arizpe only saw Claimant twice, whereas Claimant's treating doctors have seen him on a regular basis. Parents contended that Claimant began speaking between the ages of three and four, whereas Arizpe's report states that parents told her that Claimant was speaking in full sentences by age three.

8. On October 19, 2011, Service Agency representative Mary Rollins (Rollins) met with parents. After the meeting, Rollins spoke with Thompson Kelly (Kelly), the chief psychologist at the Service Agency. The service agency recommended that Claimant be evaluated by a multi-disciplinary and a date of October 26, 2011, was offered to parents. A multi-disciplinary team evaluation allows one clinician to work with Claimant and administer any necessary testing. The other eligibility team members also observe Claimant, without his knowledge, behind “dark” glass. Because Asperger’s and Autism can be subjective diagnoses, having a team evaluate Claimant can be very useful to the Service Agency in its ultimate conclusion as to whether or not Claimant is eligible for services. Specifically, one of the tests the Service Agency offered, and wanted to perform, was the Autistic Diagnosis Observation Schedule (ADOS). The ADOS is well-recognized as a useful tool in determining Claimant’s deficits in communication and socialization.
9. In order to perform the evaluation discussed immediately above, Claimant’s consent was required. Both parents and the Service Agency wanted Claimant to attend the offered evaluation. However, Claimant is 22 years of age and his parents have not been designated as his conservators. Claimant refused to attend this suggested meeting/evaluation. According to parents, Claimant does not believe that he has any disability, and he is therefore unwilling to participate in additional testing which may result in a diagnosis that he has a developmental disability. While the decision regarding whether to attend the evaluation was Claimant’s, it is noted that Claimant has seen many other doctors, has previously been diagnosed with Asperger’s, has received treatment for Asperger’s since 2004, and has received ST at his school as well as informal assistance from his school as discussed in factual finding 4.

Claimant’s evidence

10. On February 28, 2011, Yoram Jaffe, Ph.D. (Jaffe), a licensed clinical psychologist, diagnosed Claimant as having Asperger’s and OCD.
11. On May 2, 2011, Jaffee issued a two-page letter which stated that he had been providing psychotherapy to Claimant since January 17, 2011. The letter also again discussed Claimant’s diagnoses, namely severe Asperger’s and including features of OCD and Attention Deficit Disorder (ADD).
12. On September 7, 2011, Jaffe issued a three-page letter which discussed, in part, Claimant’s history, Claimant’s past and present treatment, Claimant’s current level of functioning, and Claimant’s probable future needs. Jaffe did not change his prior diagnoses regarding Claimant.
13. On September 20, 2011, Michal Mayo-Dvir, Psy.D (Dvir), a licensed marriage and family counselor (MFCC) issued a two-page report. Dvir stated that she had seen Claimant intermittently between June 18, 2004, and May 18, 2010. Similar to Jaffe, she also concluded that Claimant has Asperger’s. In or about May 2010, Dvir referred parents and Claimant to Dr. Daniel E. Grosz (Grosz) because she felt

Claimant could benefit from treatment from other health care professionals. That is, she felt that Claimant had progressed to a point where her treatment alone was no longer sufficient. Dvir referred Claimant to Grosz. Grosz then referred Claimant to Jaffe. Claimant discontinued seeing Dvir for financial reasons. That is, parents could not afford to pay for Grosz, Jaffe, and Dvir.

14. On October 14, 2011, Jaffe issued a three-page report entitled “Diagnostic Impression.” In this report, Jaffe changed his diagnosis of Claimant’s condition from Asperger’s to Autism. He based his change in diagnosis, at least in part, due to a letter dated October 10, 2011, from Maccabi Health (MH), a medical institution in Israel, where Claimant lived until he was approximately 11 years of age. That letter, written in Hebrew, states that Claimant was referred to MH at age 3 because Claimant was not speaking and had deficits in “language.” The letter was translated by Jaffe and parents. MH tested Claimant’s “language” abilities and provided Claimant with ST and occupational therapy (OT) for his fine motor skills deficits. At MH, Claimant was seen by psychologists and medical doctors that specialized in developmental disabilities.
15. On November 19, 2010, and May 10, 2011, Grosz wrote a “prescription” and a one-page letter, both of which diagnosed Claimant as having Asperger’s and OCD.
16. On October 4, 2011, Grosz wrote a one-page letter which diagnosed Claimant with Autism and OCD. Grosz did not explain why his diagnosis had changed, nor did he discuss the diagnostic criteria as described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), a highly respected, and regularly utilized, manual in the diagnosis of mental illness. His one-page letter is insufficient to support a diagnosis of Autism and it is noted that his change in diagnosis occurred less than 30 days before the instant hearing.

Applicable Law

17. Various statutes and regulations relating to eligibility may apply to Claimant’s request for services. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability.
18. “Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.
19. As relevant here, California Code of Regulations, title 17, section 54000, defines

“developmental disability” and requires that the disability must originate before age 18, be likely to continue indefinitely, and constitute a substantial handicap. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature.

20. These three exclusions from the definition of “developmental disability” section 54000 are further defined therein. Impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it is the individual’s sole disorder, would not be considered a developmental disability. “Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have been seriously impaired as an integral manifestation of the disorder.”

21. Nor would an individual be considered developmentally disabled whose only condition was a learning disability (a significant discrepancy between estimated cognitive potential and actual level of educational performance) which is not “a result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder” Also excluded from the definition of “developmental disability” are solely physical conditions such as faulty development, not associated with a neurological impairment, which results in a need for treatment similar to that required for mental retardation.

22. Also useful are the following provisions of California Code of Regulations (CCR), title 17, section 54001:

“(a) ‘Substantial handicap’ [as required to find a “developmental disability” under CCR section 54000] means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.”

“(b) Since an individual’s cognitive and/or social functioning are many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

- (1) Communication skills;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self-sufficiency.”

The Autistic Disorder

23. Much of the evidence consists of different reports and diagnoses of Claimant's condition. A better understanding of the nature of Autistic disorder will give more meaning to the significance of some of this information in the context of the issues in this case.
24. The DSM-IV-TR uses a number system for the different disorders which is accepted by most medical and psychotherapeutic professionals (and insurance companies) as a shorthand method to designate the disorders that are more specifically described in the manual. It contains a list of diagnostic criteria for Autism. Exhibit 17 defines the DSM-IV-TR diagnosis requirements for "Autistic Disorder 299.00." Exhibit 18 defines the DSM-IV-TR diagnosis requirements for "Asperger's Disorder 299.80."
25. A diagnosis of Autism requires a review of 12 different categories of symptoms or behaviors and a conclusion that at least 6 are present; however, the six or more symptoms or behaviors must include at least 2 of the 4 listed in section A1, at least one of the 4 listed in section A2, and at least 1 of the 4 listed in section A3. Also necessary is a finding that sections B and C apply. This Decision will discuss only those symptoms or behaviors that have relevance to Claimant.
26. The DSM-IV-TR gives further explanations of these criteria, the significant aspects of which are summarized below.
27. According to the DSM-IV-TR, the features of Autism are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. It can differ greatly from person to person. There is no definitive test for it; rather, the list of symptoms and behaviors is an attempt to collect and categorize the known features into a workable diagnostic reference tool.
28. According to the DSM-IV-TR, the criteria in section A1 are referred to as qualitative impairments in social interaction, which must be gross and sustained. At least two of the four features are needed. The criteria in section A2 are referred to as qualitative impairments in communication, which must be marked and sustained and affect both verbal and nonverbal skills. At least one of the four features is needed. The criteria in section A3 are referred to as restricted, repetitive and stereotyped patterns of behavior, interests, and activities, which must be marked and sustained and affect both verbal and nonverbal skills. At least one of the four features is needed.
29. According to the DSM-IV-TR, the criteria in section B require delays or abnormal functioning in at least one of the following areas, with onset prior to age three: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

30. In making the diagnosis of Autistic Disorder, Jaffe concluded that Claimant meets each of the following criteria under the DSM-IV-TR: Category A (1)(a, b, c and d); Category A (2) (a and c); Category A (3)(a, and b); Category B; and Category C. While Jaffe did not specifically state that Claimant met the criteria for Category C, no evidence established that Claimant's deficits are "better accounted for by Rett's Disorder or Childhood Disintegrative Disorder."
31. Jaffe's diagnostic opinion is not convincing. First, he began seeing Claimant in January 2011. It was not until 21 days before the instant hearing that he changed his diagnosis to Autism, rather than Asperger's. His change of opinion was allegedly based on the one-page medical "report" (exhibit A) from MH. Jaffe contended that this record established that Claimant had deficits in language as used as used in social communication prior to age three. If accurate, this deficit would satisfy Category B. Jaffe's report does not explain how, why, or if Jaffe did, or did not, previously discuss Claimant's history with the parents during the prior 10 months he was seeing Claimant. It would be expected that Jaffe would have inquired from parents as to when Claimant began speaking well before he received the MH report. Second, Arizpe reported that parents told her that Claimant was using words and sentences prior to age three. Prior to reviewing the MH report, Jaffe never mentioned that parents had reported that Claimant was not speaking at age three. The evidence established that prior to October 2011 parents did not inform the involved medical professionals that Claimant was not speaking at age three. Third, assuming arguendo that exhibit A supported Jaffe's finding that Categories A (2)(a) and Category B were established, Jaffe also found that Category A (2)(c) applied. Again, October 14, 2011, just prior to the instant hearing, was the first time Jaffe referenced this qualifying criterion in the area of communication. That is, during his prior 10 months of evaluating Claimant, Jaffe never indicated that Claimant met criteria as stated in Category A (2)(c).
32. It was not established that Claimant has a diagnosis of PDD/NOS or "fifth category." Claimant has been diagnosed by multiple professionals as having Asperger's. Claimant had an opportunity to allow the Service Agency to perform additional testing, namely the ADOS. It would be speculative to conclude that said testing would have altered this decision. Nevertheless, it was established that Claimant's condition is and was difficult to diagnose. This was established because Kelly disagreed with Arizpe's diagnosis of Asperger's. Without additional testing, he is unsure of how to diagnose Claimant. However, without additional testing, Kelly, Arizpe, and Grosz and Jaffe, at least at some point in time, all concluded that Claimant did not meet the diagnostic criteria for Autism. Thus, Claimant failed to establish that he meets the criteria for a diagnosis of Autism.
33. Claimant did not establish that he qualifies under the fifth category, because he does not have significant delays in cognitive development.

34. It was not established that the Service Agency's denial of eligibility was incorrect. Claimant did not establish that he has: (a) a developmental disability and (b) a substantial disability.

LEGAL CONCLUSIONS AND DISCUSSION

1. Throughout the applicable statutes and regulations (Welfare & Institution Code §§ 4700 - 4716, and CCR, title 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Particularly in this instance, where Claimant seeks to establish his eligibility for services, the burden is on the appealing Claimant to demonstrate that he is eligible, and that the Service Agency's decision to deny eligibility is incorrect. See, also, Evidence Code section 500.
2. Throughout the applicable statutes and regulations, found in Welfare & Institution Code sections 4700-4716, and CCR, title 17, sections 50900 - 50964, the state level fair hearing is referred to as an appeal of the regional center's decision. In this instance, where the Claimant seeks to establish his eligibility for services, the burden is on him to demonstrate that he is eligible. The burden of proof is by a preponderance of the evidence. (Evid. Code, §§ 115 and 500, and Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.) No published decision has been found that addresses the applicability of this general principle to Lanterman Act fair hearing proceedings. It is concluded by analogy, however, that the party in such proceedings who seeks to change the status quo has the burden of proof. Thus, Claimant had the burden of proof to establish his eligibility.
3. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (Id, at p. 1137.)

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4. Based on the above, Claimant has not met his burden of proving that he has a qualifying developmental disability because of the reasoning stated in Factual Findings 1-34 and Legal Conclusions 1-3.

ORDER

Claimant has not established his eligibility for services. Claimant's appeal of the Service Agency's determination that he is not eligible for services from the Service Agency is denied.

DATED: 11/4/11

/s/
CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.